Supreme Court, U.S.
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No. 06-439

IN THE

Supreme Court of the United States

JERRY SUMMERS, GEORGE T. LENORMAND, JEFFERY D. CRITES, LOUISE VAN RAENSBURG and JAMES E. SHAMBO, individually and on behalf of all others similarly situated,

Petitioners,

v.

STATE STREET BANK & TRUST COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Seventh Circuit err in affirming the district court's grant of summary judgment, concluding Petitioners presented insufficient evidence to overcome the presumption that the directed trustee of an employee stock ownership plan fulfilled its fiduciary duty by following the directions of the named fiduciaries to remain invested in employer stock?

LIST OF PARTIES AND DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

In addition to the parties identified in the caption, the following were parties in the consolidated appeal proceedings before the Seventh Circuit Court of Appeals: UAL Corporation Employee Stock Ownership Plan Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, and Craig Musa.

Respondent State Street Bank & Trust Company ("State Street") is a wholly-owned subsidiary of State Street Corporation, a bank holding company with no other business.

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STATUTES AND OTHER PROVISIONS INVOLVED

Statutes at issue in this case include the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(21)(A), 1102(a)(2) (Resp. App. A and B), 1103(a)(1), 1104(a)(1), 1109(a), and 1132(a) (Pet. App. C, D, F and G). Also at issue is U.S. Department of Labor Employee Benefits Security Administration, Fiduciary Responsibilities of Directed Trustees, Field Assistance Bulletin 2004-03 (Dec. 17, 2004) (Pet. App. H), Federal Rule of Civil Procedure 56(c) (Resp. App. C), and Seventh Circuit Rule 40(e) (Resp. App. D).

STATEMENT OF THE CASE

After UAL Corporation ("UAL")[1] declared bankruptcy at the end of 2002, the participants of the UAL employee stock ownership plan (the "Plan") sued the fiduciaries of the Plan, claiming the fiduciaries breached their duties under ERISA by failing to divest the Plan of UAL stock and to override the terms of the Plan, which required that the assets be invested exclusively in UAL stock, fourteen months prior to the bankruptcy filing. *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 405 (7th Cir. 2006).

The ESOP Committee (the "Committee") and its members, the only named fiduciaries in the Plan, 29 U.S.C. § 1102(a)(2), settled with Petitioners. The remaining defendant and Respondent in these proceedings, State Street Bank & Trust Company ("State Street"), was the directed trustee and a co-fiduciary of the Plan.

The Plan's Trust Agreement (the "Trust Agreement") obligated State Street, as directed trustee, to follow the Committee's directions and gave State Street no discretion regarding the disposition of the Plan's assets.[2] The Trust

[1] UAL Corporation is the holding company whose primary subsidiary is United Airlines.

[2] R.Doc.130, Ex. 2, Ex. A (Trust Agreement at § 3.1).

Agreement required State Street to invest the assets of the trust fund "exclusively" in UAL stock at the "direction of the ESOP Committee."[3] Under the Trust Agreement, State Street had to follow the directions of the Committee as long as such direction was in accordance with the terms of the Plan, proper within the meaning of 29 U.S.C. § 1103(a), and not contrary to ERISA.[4]

State Street monitored the financial condition of its clients, including UAL, whose ESOPs held the respective client's stock ("Employer Securities"), irrespective of whether State Street was the named fiduciary or the directed trustee.[5] CitiStreet LLC ("CitiStreet") performed this monitoring function on State Street's behalf. CitiStreet had two committees that met regularly to review Employer Securities: the Fiduciary Committee and the Watchlist Committee. (The latter reported to the former.) If an Employer Security were deemed to be "at-risk," the Watchlist Committee placed it on a watchlist, to be reviewed more closely by the Watchlist Committee.[6]

On December 20, 2001, the Watchlist Committee placed UAL on the watchlist after evaluating information concerning UAL's financial condition, including: an October 17, 2001 letter from then-Chief Executive Officer James Goodwin to UAL's employees asking for wage concessions following the tragic events of September 11, 2001 (the "Goodwin Letter"); analyst reports; and a benchmark deviation report showing that UAL stock deviated from its established benchmark three times within a four-week period.[7]

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[3] R.Doc.130, Ex. 2, Ex. A (Trust Agreement at § 3.3).

[4] R.Doc.130, Ex. 2, Ex. A (Trust Agreement at § 3.6.3).

[5] R.Doc.124 (State Street Statement of Undisputed Facts in support of Summary Judgment ("SUF") ¶ 4); R.Doc.130, Ex. 11 (Declaration of Susan Daniels ("Daniels Decl."), ¶ 22).

[6] R.Doc.124 (SUF ¶ 6); R.Doc.130, Ex. 11 (Daniels Decl., ¶¶ 7-20).

[7] R.Doc.124 (SUF ¶ 11); R.Doc.130, Ex. 11 (Daniels Decl.,¶ 23), Ex. C (December 20, 2001 Watchlist Minutes).

Petitioners argue placement on the watchlist was insufficient and that, following issuance of the Goodwin Letter, State Street should have overridden the Plan, Trust Agreement, and the directions of the named fiduciary, and should have sold the UAL stock held by the ESOP. Petitioners contend the Goodwin Letter was a clear "sign" or "warning" that UAL would shortly file bankruptcy. State Street did not agree.

The Goodwin Letter was issued in the context of labor negotiations and was understood by many, including analysts and the machinists' union, to be a negotiating ploy.[8] The Goodwin Letter was a rallying call to the employees and the unions to come to the bargaining table and threatened that if various events and agreements were not reached, UAL would "perish some time next year."[9] The phrase "some time next year" "clearly indicates that any such problems could very easily have been far off in 2002." *Summers v. UAL Corp. ESOP Comm.*, No. 03 C 1537, 2005 U.S. Dist. LEXIS 23918, at *17 (N.D. Ill. Oct. 12, 2005). Moreover, the Goodwin Letter concluded in an upbeat and hopeful manner: "The sooner we get to break even, the sooner we'll remove the doubts about our future." The machinists' union sharply criticized the letter.[10] Goodwin subsequently resigned, and his successor Jack Creighton immediately and unequivocally stated that UAL was not considering bankruptcy.[11]

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[8] R.Doc.124 (SUF ¶ 34); R.Doc.130, Ex. 8 (Declaration of Gary Sbona ("Sbona Decl."), Ex. A (Expert Report of Gary Sbona ("Sbona Report"), ¶ 27); R.Doc.158 (Plaintiffs' Response To State Street's Statement of Undisputed Facts ("PR") ¶ 37).

[9] R.Doc.130, Ex.2 (Declaration of Marian M. Durkin ("Durkin Decl.") ¶ 42), Ex. E ("Goodwin Letter").

[10] R.Doc.129, Exhibits to UAL ESOP Committee Defendants' Statement of Undisputed Facts ("Committee Def.") Ex. 41 (Wash. Post Article, undated).

[11] R.Doc.129, Committee Def. Ex. 39 (WSJ.Com Article, 10/29/2001).

During the next nine months, the Watchlist Committee actively monitored UAL's performance and regularly provided the Fiduciary Committee with benchmark deviation reports on UAL's stock.[12] While State Street monitored the UAL stock, it knew that the named fiduciaries on the Committee also reviewed financial information about UAL. State Street was aware that Houlihan Lokey Howard & Zukin ("Houlihan Lokey") (outside consultants) presented investment advice to the Committee, including copies of annual valuation reports, analyses of UAL's financial condition, and presentations regarding the value of UAL stock.[13] The oral and written presentations included summaries of analyst recommendations, a general industry and economic overview, and information about UAL's financial status.[14]

Of the approximately 110 analyst reports dated from October 17, 2001 through August 13, 2002 (including all those Petitioners cite),[15] none recommended selling during the relevant time period and at least one recommended "accumulate."[16] None said UAL's bankruptcy was highly probable and none said bankruptcy was going to occur in the near or short term.[17] One

[12] R.Doc.124 (SUF ¶ 12); R.Doc.130, Ex. 11 (Daniels Decl., ¶¶ 24-26), Ex. D-F (Watchlist and Fiduciary Committee Minutes; Deviation Reports).

[13] R.Doc.130, Ex. 9 (Declaration of Ben Buettell ("Buettell Decl."), ¶¶ 9-12); R.Doc.167 (State Street's Statement of Additional Facts In Opposition to Plaintiffs' Motion For Partial Summary Adjudication ("SAF"), ¶ 91).

[14] R.Doc.167 (SAF ¶ 91); R.Doc.130, Ex. 9 (Buettell Decl., ¶¶ 17-20), Ex. D-I (Draft Presentation & Draft Discussion Materials); Ex. 10 (Declaration of Kelly Q. Driscoll ("Driscoll Decl.") ¶ 10).

[15] R.Doc.167 (SAF ¶ 71); R.Doc.130, Ex. 15 (Declaration of Ronald S. Kravitz ("Kravitz Decl."), ¶¶ 6-7), Ex. F (Analyst Reports).

[16] R.Doc.167 (SAF ¶ 66); R.Doc.130, Ex. 15 (Kravitz Decl., ¶¶ 6-7), Ex. F (Analyst Reports).

[17] R.Doc.167 (SAF ¶ 71); R.Doc.130, Ex. 15 (Kravitz Decl., ¶¶ 6-7), Ex. F (Analyst Reports).

commentary specifically noted that the Goodwin Letter did not mean UAL was facing bankruptcy.[18]

As part of its monitoring duties, State Street, CitiStreet, and Houlihan Lokey met with a representative of UAL's investor relations department in April 2002, to evaluate UAL's progress in implementing its recovery plan.[19] In May 2002, the Fiduciary Committee issued a report noting that UAL had billions of dollars in reserves; analyst reports recommended a "buy" or "hold"; benchmark deviation reports remained favorable; and UAL was actively involved in ongoing negotiations with its unions, the primary goal of which was to reduce costs.[20] Although the report stated that there was a "high risk" that UAL would not be able to gain the "wage concessions" it was requesting of the unions, it also noted that "[a]t the end of June, 2002, UAL stated its daily losses were significantly lower than in the First Quarter" of 2002.[21]

"In a sharp reversal from its previous stance," UAL issued a press release on August 14, 2002, warning that it may file bankruptcy that autumn unless "employees and vendors agree to dramatic wage and cost concessions."[22] State Street responded immediately by requesting a meeting with the Committee.[23]

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[18] R.Doc.16, (SAF ¶ 65); R.Doc.130, Ex. 15 (Kravitz Decl., ¶¶ 6-7), Ex. F (Analyst Reports).

[19] R.Doc.124 (SUF ¶ 15); R.Doc.130, Ex. 11 (Daniels Decl.,¶ 26).

[20] R.Doc.124 (SUF ¶ 16); R.Doc.130, Ex. 11 (Daniels Decl., ¶¶ 27-28), Ex. H (May, 2002, State Street Report).

[21] R.Doc.130, Ex. 11 (Daniels Decl.,¶¶ 27-28), Ex. H (May, 2002, State Street Report).

[22] R.Doc.184, Plaintiffs' Exhibits In Opposition To State Street's Motion For Summary Judgment ("Pfs.' Ex.") 58 (Chicago Tribune Article, 8/15/02).

[23] R.Doc.130, Ex. 10 (Driscoll Decl., ¶ 15); Ex. 9 (Buettel Decl., ¶ 16); Ex. 2 (Durkin Decl., ¶ 46).

On August 20, 2002, State Street and the Committee met. State Street asked the Committee whether it had come to any conclusions about the prudence of continuing to hold UAL stock.[24] The Committee's lawyers attended this meeting, as well as the previous meetings, and knew that the Committee had an obligation to consider whether it was prudent to retain UAL stock in the Plan. State Street did not have any reason to believe that the Committee and its lawyers had not previously discussed selling the UAL stock in the Plan.[25]

On August 30, 2002, the Committee responded, on the advice of its counsel, by asking State Street to become Investment Manager of the Plan.[26] State Street agreed and became Investment Manager effective September 7, 2002.[27] Shortly thereafter, State Street evaluated alternative investments for the Plan and consulted with Houlihan Lokey, investment bankers, investment analysts, union representatives (who expressed optimism about labor negotiations), and UAL's Chief Financial Officer (who was hopeful that a solution could be found).[28]

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[24] R.Doc.124 (SUF ¶ 18); R.Doc.130, Ex. 10 (Driscoll Decl., ¶ 17).

[25] R.Doc.124 (SUF ¶¶ 59-60, 62); R.Doc.130, Ex. 6 (Declaration of Bonnie Levitt ("Levitt Decl."), ¶¶ 7, 12-14, 20), Ex. 12 (Declaration of Marty Torres ("Torres Decl."), ¶¶ 14-21), Ex. 13, (Declaration of Barry Wilson ("Wilson Decl."), ¶¶ 15-22).

[26] R.Doc.130, Ex. 10 (Driscoll Decl., ¶ 20); Ex. 2 (Durkin Decl., ¶¶ 45-49); Ex. 4 (Declaration of Wayne Jacobsen ("Jacobsen Decl."), ¶¶ 16-17), Ex. B (8/29/02 Committee minutes).

[27] R.Doc.124 (SUF ¶ 19); R.Doc.130, Ex. 10 ((Driscoll Decl., ¶ 20); Ex. 2 (Durkin Decl., ¶ 49), Ex. H (Investment Manager Engagement Letter).

[28] R.Doc.124 (SUF ¶ 20); R.Doc.130, Ex. 10 (Driscoll Decl., ¶ 25) and Ex. B; Ex. 9 (Buettell Decl., ¶ 19), Ex. F (Draft Discussion Materials).

On September 25, 2002, State Street determined that it was no longer prudent for the Plan to hold UAL stock and authorized appropriate actions to sell the stock as soon as possible.[29] On September 27, 2002, State Street began divesting the Plan of UAL stock.[30] On December 9, 2002, a few days after the Air Transportation Stabilization Board loan was denied, UAL filed its chapter 11 bankruptcy petition.[31] As a result of State Street's efforts, the Plan sold over $40 million of UAL stock before UAL commenced its bankruptcy case.[32]

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because it is procedurally defective, there is no intercircuit conflict, and the petition fails to satisfy any of the criteria specified by Supreme Court Rule 10 for issuance of a writ.

The petition is procedurally defective because it improperly requests the Court to affirm a lower court ruling on the responsibilities of directed trustees, and the argument that directed trustees and named fiduciaries have identical duties was never raised below and cannot be raised for the first time in a petition for certiorari.

Contrary to petitioner's claims, there is no intercircuit conflict as the Seventh Circuit's opinion in *Summers* is the only court of appeals to decide, based upon the evidence in the record, whether a directed trustee of an ESOP has a fiduciary duty to

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[29] R.Doc.130, Ex. 10 (Driscoll Decl., ¶ 37), Ex. F (9/25/02 Fiduciary Committee Minutes).

[30] R.Doc.124 (SUF ¶ 22); R.Doc.130, Ex. 10 (Driscoll Decl., ¶ 38).

[31] R.Doc.124 (SUF ¶ 23); R.Doc.130, Ex. 1 (Declaration of Andrew Carron ("Carron Decl.")), Ex. A (Expert Report of Andrew Carron ("Carron Export Report"), ¶ 18).

[32] R.Doc.124 (SUF ¶ 24); R.Doc.130, App. 10 (Driscoll Decl., ¶ 38).

replace the employer's stock with another investment, and if so, what evidence would be sufficient to overcome the presumption that directed trustees of an ESOP fulfill their fiduciary duties by following the directions of the named fiduciaries to remain invested in employer stock.

To fabricate a conflict, Petitioners argue for the first time in these proceedings that directed trustees and named fiduciaries have identical fiduciary duties, that *Summers* concluded directed trustees and named fiduciaries have identical duties, and that a conflict exists as a result of the purported differences between *Summers* and the courts of appeals decisions determining whether and when *named fiduciaries* breach their fiduciary duties in failing to diversify an ESOP.

Petitioners' logic fails because they premise their argument on misstatements of law and the *Summers* holding. ERISA's statutory framework distinguishes the responsibilities of named fiduciaries and directed trustees, requiring directed trustees to follow the directions of the named fiduciaries and/or the plan as long as the directions are consistent with ERISA. *Summers* follows this law, noting that the key word in the statute is "directed." The named fiduciaries make the fiduciary decision to remain invested in employer stock. The directed trustee may override the decision of the named fiduciaries and the terms of the ESOP if the decision is imprudent. It does not make fiduciary decisions in the first instance. No court of appeals has held that directed trustees' fiduciary duties are identical to those of the named fiduciaries.

After misstating both the law and the *Summers* holding, Petitioners compare *Summers* with the four courts of appeals that have considered when a named fiduciary has a duty to diversify an ESOP's investment and argue that the Seventh Circuit did not follow these cases because it created a new per se rule that the presumption that the fiduciary acted reasonably cannot be overcome by evidence of a stock drop, evidence that the stock would certainly drop further, and evidence that the

company was spending large amounts of money (as Petitioners contend they presented). In fact, the Seventh Circuit's holding is consistent with the four court of appeals decisions and the Seventh Circuit did not create a per se rule, but rather held that Petitioners failed to present sufficient evidence of risk to overcome the presumption of prudence.

In dicta, the Seventh Circuit suggested that Petitioners could have overcome the presumption with evidence that at the time UAL formed the ESOP, the creators of the Plan (the settlors) reasonably could not have intended to place risk-averse employees into a plan that provided for only one investment alternative. The Seventh Circuit correctly noted that the Petitioners never explored what the settlors' intent may have been and whether the financial condition of UAL reached a point where it would have been appropriate to diversify the ESOP because of excessive risk beyond that which settlors reasonably intended. Petitioners argue that the Seventh Circuit's "formulation" of the risk standard improperly requires an ad hoc analysis of the risk borne by individual plan participants. Petitioners are wrong. Petitioners distort and misinterpret the Seventh Circuit's decision, as it only suggests consideration of wages and other benefits of all employees in the context of evaluating the risk of an ESOP, the settlor's intent, and whether Petitioners had overcome the presumption of prudence.

In sum, the petition should be denied because it is procedurally defective and because there is no intercircuit conflict concerning the fiduciary duty of directed trustees and what constitutes sufficient evidence to overcome the presumption that directed trustees act prudently when they follow the directions of the named fiduciary and remain invested in employer stock.

I. THERE IS NO INTERCIRCUIT CONFLICT REGARDING THE FIDUCIARY DUTY OF DIRECTED TRUSTEES

A. Petitioners' Argument Is Procedurally Defective

Mischaracterizing the Seventh Circuit's decision, Petitioners argue that *Summers* correctly held that directed trustees and named fiduciaries have identical duties. Petition at 22-23. Petitioners argue that this conflicts with a 1994 Eighth Circuit decision that this Court should overrule. Petitioners' argument is procedurally defective. Petitioners ask this Court to accept certiorari in order to affirm the Seventh Circuit's decision on the responsibilities of directed trustees, follow *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907 (8th Cir. 1994), and overrule *Maniace v. Commerce Bank, N.A.*, 40 F.3d 264 (8th Cir. 1994). Certiorari should not be granted to affirm a holding of the lower court.[33]

Moreover, Petitioners' argument that directed trustees and named fiduciaries have identical fiduciary duties was not raised below and cannot be raised for the first time in a petition for certiorari. *See Clingman v. Beaver*, 544 U.S. 581, 597-98 (2005).

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[33] Robert L. Stern et al., *Supreme Court Practice* ¶ 6.16 at 385 (8th Ed. 2002); *see also Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 176 (1934) ("The Company was successful in the District Court and has no right of appeal from the decree in its favor. The Company is not entitled to prosecute such an appeal for the purpose of procuring a review of the findings of the court below with respect to the value of the Company's property or the other findings of which it complains."); *Pub. Serv. Comm'n. v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-207 (1939) (citations omitted) ("The Public Service Commission as the successful party below has no standing to appeal from the decree denying the injunction. And as no appeal has been taken to review the decree denying the injunction, this Court is without jurisdiction.").

B. The Seventh Circuit Held A Directed Trustee Has Limited Fiduciary Duties

The Seventh Circuit acknowledged State Street was a "'directed' trustee, [pursuant to 29 U.S.C. § 1103(a)(1)] because the Committee (the fiduciary named in the plan), in accordance with the plan language . . . , directed State Street to invest the ESOP's assets exclusively in stock of United Air Lines." *Summers*, 453 F.3d at 406. Title 29 U.S.C. § 1103(a)(1) specifically recognizes that trustees have limited authority or discretion when:

> the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to [ERISA].

Recognizing § 1103(a)(1) limits the discretion of directed trustees, the Seventh Circuit first addressed whether this statutory provision eliminated a directed trustee's fiduciary duty entirely or merely limited it. The Seventh Circuit set forth the issue as follows: "We must first decide whether a directed trustee of an ESOP has *any* fiduciary duty with respect to the choice of trust assets, specifically any duty ever to replace the employer's stock — the normal holding of an ESOP — with some other security." *Summers*, 453 F.3d at 406 (emphasis added).

The Seventh Circuit held that a directed trustee is a fiduciary because the statute pertaining to directed trustees, § 1103(a)(1), specifies that the directed trustee cannot rely upon directions that are contrary to ERISA. Quoting § 1103(a)(1), the Seventh Circuit held: "the directed trustee 'shall be subject to *proper* directions of [the named] fiduciary which are made in accordance with the terms of the plan and w*hich are not contrary to [ERISA].*'" *Summers*, 453 F.3d at 406 (emphasis and alterations in original).

Focusing on the statutory language, the Seventh Circuit stated: "'[D]irect' is the critical word . . . the trustee can disobey the named fiduciary's directions when it is plain that they are imprudent." *Summers*, 453 F.3d at 406 (alteration in original). *Summers* held that the language of the statute makes clear that a directed trustee has no "'direct obligation to determine the prudence of a transaction' entrusted by the plan to another fiduciary." *Summers*, 453 F.3d at 406 (quoting U.S. Department of Labor Employee Benefits Security Administration, Fiduciary Responsibilities of Directed Trustees, Field Assistance Bulletin 2004-03 (Dec. 17, 2004) (the "DOL Bulletin") at 4). In arguing directed trustees and named fiduciaries have identical duties, and that *Summers* held the duties were identical, Petitioners fail to explain § 1103(a)(1).

In analyzing the question whether trustees have any fiduciary duties concerning the choice of trust assets, the Seventh Circuit noted a "split" of opinion between (a) those courts that have suggested that directed trustees *have no fiduciary duties* (citing *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1361-62 (11th Cir. 1997) (noting in dicta that directed trustees do not have any fiduciary duties) and *Maniace*, 40 F.3d at 267-68 (finding that directed trustee did not have any fiduciary duty to diversify the plan assets because of specific language in the plan)), and (b) those courts that hold directed trustees are fiduciaries (citing *FirsTier*, 16 F.3d at 911 and *In re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423, 444-45, 449 (S.D.N.Y. 2005)). *Summers*, 453 F.3d at 406.

Petitioners mischaracterize the "split" mentioned by the Seventh Circuit to assist them in misconstruing the Seventh Circuit's holding. The Third and Eleventh Circuits have "stated their views" "in *dicta* in cases that did not involve directed trustees" (as Petitioners acknowledge at p. 24), indicating that directed trustees are not fiduciaries. *Herman*, 126 F.3d at 1361 (stating a directed trustee "is not subject to the fiduciary requirement in § 1104(a) to act prudently"); and *Moench v.*

Robertson, 62 F.3d 553, 571 (3d Cir. 1995). In *Maniace*, the Eighth Circuit held that the directed trustee was a fiduciary,[34] but that plaintiffs failed to demonstrate that the purchase of the employer's stock violated the plan or was contrary to ERISA. *Maniace*, 40 F.3d at 268. In reaching this conclusion, the court noted that the underlying fiduciary direction was not a violation of ERISA. *Id. See also Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1103 (9th Cir. 2004) ("If the underlying fiduciary direction itself is not in violation of ERISA, the directed trustee's compliance with that direction cannot serve as a basis for liability.").

Petitioners argue that *FirstTier*, which the Seventh Circuit relied upon in concluding that directed trustees are fiduciaries, held that directed trustees are identical to named fiduciaries. Petitioners fail to discuss *WorldCom*, which the Seventh Circuit also relied upon in reaching its conclusion that directed trustees are fiduciaries. Neither *FirstTier* nor *WorldCom* held that directed trustees' fiduciary duties are identical to named fiduciaries.

WorldCom and *FirsTier* recognize that although "directed trustees" are fiduciaries, not all ERISA fiduciaries are the same, and the fiduciary duties of directed trustees are "'significantly narrower than the duties generally ascribed to a discretionary trustee under common trust principles.'" *WorldCom*, 354 F. Supp. 2d at 446 (quoting the DOL Bulletin at 2); *FirsTier*, 16 F.3d at 911 (finding that § 1103(a)(1) "modifies" the extent of a

[34] The opinion contains language stating that the directed trustee does not "fit within the ERISA definition of a fiduciary," and its conduct is governed exclusively by § 1103(a)(1). *Maniace*, 40 F.3d at 268. However, the Eighth Circuit also implicitly acknowledged the directed trustee was a fiduciary when it analyzed whether the directed trustee was liable as a co-fiduciary. *Id.* It concluded the directed trustee was not liable as a co-fiduciary because the named fiduciary had not breached its fiduciary duties and therefore plaintiffs could not show that the directed trustee either participated in said breaches or knew of the breaches and did nothing to remedy them. *Id.*

directed trustee's fiduciary duties). A directed trustee has no duty to render investment advice or "investigate the wisdom of [the named fiduciary's investment] choices or any obligation to render advice regarding the choices." *WorldCom*, 354 F. Supp. 2d at 449.

The Seventh Circuit's holding in *Summers* is consistent with other courts of appeals decisions and the position of the Department of Labor. *See Wright*, 360 F.3d at 1103 (discussion of trustee's limited liability under ERISA assumes a directed trustee is a fiduciary); *LaLonde v. Textron, Inc.*, 369 F.3d 1, 7 (1st Cir. 2004) (same); DOL Bulletin at 2 (directed trustees have "significantly narrower" fiduciary responsibilities designed to ensure that the directions it receives from the named fiduciary are in accordance with the plan and not contrary to ERISA).[35]

II. THE SEVENTH CIRCUIT DID NOT CREATE A NEW STANDARD

A. The Seventh Circuit Followed The Abuse Of Discretion Standard

Beginning with *Moench*, courts of appeals that have considered whether and when a fiduciary has a duty to diversify employer stock in an ESOP have uniformly held that a duty exists, but that the decision to remain invested in employer stock is limited to a review for an abuse of discretion. *Moench*, 62 F.3d at 571. *See, e.g., LaLonde*, 369 F.3d at 4; *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *cf. Wright*, 360 F.3d at 1097-98 (questioning whether any duty existed at all, but ultimately applying the abuse of discretion standard). Petitioners argue that the Seventh Circuit did not follow *Moench* and its progeny, but instead set forth a "new standard," thereby creating a split in

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[35] Courts grant "considerable and in some cases decisive weight" to interpretive bulletins depending on, among other things, the "thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements. . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

the circuits. Petition at 14. A brief explanation of the development of the standard illustrates why the Seventh Circuit's decision is consistent with the four other courts of appeals that have considered the issue.

Employee stock ownership plans like the Plan, are, in accordance with 29 U.S.C. § 1104(a)(2), exempt from ERISA's duty to diversify the investments of the plan "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. . . ." 29 U.S.C. § 1104(a)(1)(C). The Seventh Circuit held that § 1104(a)(2) and the language of a plan cannot "be interpreted to include a per se prohibition against diversifying an ESOP," because an ESOP fiduciary still has a duty of prudent investment that can override plan restrictions and § 1104(a)(2) in "special circumstances." *Summers*, 453 F.3d at 407 (quoting *Kuper*, 66 F.3d at 1457).

In developing the standard, the courts of appeals noted there are two competing concerns at issue: "Congress expressly intended that the ESOP would be both an employee retirement benefit plan and a 'technique of corporate finance' that would encourage employee ownership." *Martin v. Feilen*, 965 F.2d 660, 664 (8th Cir. 1992) (quoting 129 Cong. Rec. S16629, S16636 (Daily ed. Nov. 7, 1983) (statement of Sen. Long)). The courts of appeals attempted to find "a way for the competing concerns [of ERISA fiduciaries and ESOPs] to coexist." *Moench*, 62 F.3d at 570. Normally fiduciaries' investment decisions are subject to a strict standard of review, but such scrutiny in the context of an ESOP "would render meaningless the ERISA provision excepting ESOPs from the duty to diversify." *Id.*

The courts of appeals therefore apply a deferential standard to the fiduciary's decision not to diversify assets of an ESOP: a fiduciary's decision to remain invested in employer stock is presumed to be proper and that presumption can only be overcome by showing an "abuse of discretion." *Moench*, 62 F.3d at 571. "In attempting to rebut the presumption, the plaintiff

may introduce evidence that 'owing to circumstances not known to the settlor and not anticipated by him [the making of such investment] would defeat or substantially impair the accomplishment of the purposes of the trust.'" *Id.* (alteration in original) (quoting *Restatement (Second) of Trusts* § 227 cmt. g (1957)).

The Seventh Circuit set forth the standard it intended to follow to review the alleged failure to diversify the Plan. Fiduciaries may be required to:

> begin diversifying the ESOP's assets at the point at which an increase in the riskiness of the assets, had it been foreseen, would have induced the creators of the ESOP either to have not created it at all or to have required at least partial diversification. (. . . .) **Or,** as *Kuper v. Iovenko*, *supra*, 66 F.3d at 1459, puts it, "the plaintiff must show that the ERISA fiduciary could not have reasonably believed that the plan's drafters would have intended under the circumstances that he continue to comply with the ESOP's direction that he invest exclusively in employer securities." *See also Moench v. Robertson*, 62 F.3d 553, 571-72 (3d Cir. 1995).

Summers, 453 F.3d at 410 (emphasis added).

By first setting forth its articulation of the standard it intended to apply, and then using the word "or" and quoting the standard from *Kuper* and *Moench*, the Seventh Circuit did not intend to announce a "new" standard. *Summers* did not criticize *Moench* or its progeny, or otherwise state that it would deviate from the standard set forth in *Moench*. Significantly, the Seventh Circuit did not state that it was creating a split in the courts of appeals by rendering its decision. If the Seventh Circuit intended to create, or believed its decision created, an intercircuit conflict, it was obligated to circulate its opinion sua sponte to the full court in advance of publication pursuant to Seventh Circuit Rule

40(e), which it did not do. *See, e.g., United States v. Mitchell*, 353 F.3d 552, 561 n.9 (7th Cir. 2003) ("Because this opinion will create a conflict among the Circuit Courts, it has been circulated to all of the judges of this court in regular active service pursuant to Circuit Rule 40(e).").

1. The Seventh Circuit Concluded Petitioners' Evidence Did Not Overcome The Presumption That The Continued Investment In Employer Stock Was Prudent

The Seventh Circuit affirmed the grant of summary judgment in State Street's favor because of Petitioners' "failure of proof." *Summers*, 453 F.3d at 411. Petitioners "made no effort" to establish the point at which the ESOP trustee should sell in order to protect the employee-shareholders against "excessive risk." *Id.* Petitioners cobble together a circuit "conflict" based not on any difference in the legal standard, but rather on the application of a contextually-based test that leads to different results depending on the underlying factual circumstances and the evidence in the record. *See* Petition at 15-16 (agreeing with the Seventh Circuit's statement of the rule or the court's "basic concept," but criticizing the "formulation" or application of the standard). This Court should not grant "certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (finding improvident grant of cross-petition that presented "primarily . . . a question of fact, which does not merit Court review"); Sup. Ct. R. 10 (noting the Court will "rarely" grant review where lower court has arguably misapplied "a properly stated rule of law").

Petitioners argued that the Goodwin Letter and the drop in UAL's stock price shortly thereafter demonstrated UAL's impending collapse, thus requiring diversification of the Plan. They also argued that State Street should have started selling the UAL stock within 30 days after the issuance of the Goodwin

Letter. The Seventh Circuit found that the evidence did not support Petitioners' erroneous factual conclusion, i.e., the drop in the stock price did not reflect UAL's impending collapse. As the Seventh Circuit noted:

> The plaintiffs say the letter should have alerted State Street that United was going into the tank. That is wrong. After the market "read" the letter, it valued United stock at $15.05 a share. Had the market thought that United would be bankrupt by the end of 2002, it would not have priced its stock that high in October 2001, implying a market capitalization for the company of more than $800 million.

Summers, 453 F.3d at 408. The Seventh Circuit found that it was not imprudent for State Street to assume that a major stock market "provides the best estimate of the value of the stocks traded on it," and it was not "required to act on the assumption that the market was overvaluing United." *Id.* Moreover, the argument that State Street "should have outsmarted the market...is not a correct interpretation of the duty of prudent management of trust funds. . . ." *Id.* at 412.

2. *Summers* Did Not Create A Conflict In Its Application Of The Legal Standard

The cases Petitioners cite do not conflict regarding the application of the "abuse of discretion" standard to the underlying facts. First, *Summers* involved the application of the abuse of discretion standard to the decision of a directed trustee not to override the decision of the named fiduciary to remain invested in employer stock. Only one case upon which Petitioners rely applied the *Moench* standard to directed trustees, and Petitioners do not rely upon or reference that portion of the decision — nor could they. The application of the abuse of discretion standard in *LaLonde* to the actions of the directed trustee are consistent with the Seventh Circuit's *Summers* decision. As noted above, in *LaLonde*, the First Circuit held

that the plaintiffs failed to state a claim against the directed trustee because the allegations were only that the directed trustee knew the company's stock price and profits were declining and that the company was undergoing a restructuring. *LaLonde*, 369 F.3d at 6-7.

Second, there are no guidelines specifying what is and what is not an abuse of discretion. In applying the abuse of discretion test, no court of appeals has ever held that an ESOP fiduciary abused its discretion by failing to diversify the plan assets, and only one other court of appeals has had the opportunity to consider whether the evidence presented was sufficient to state a claim. *See generally*, *Kuper*, 66 F.3d 1447.

Courts of appeals have, in dicta, suggested factual scenarios that might be sufficient to trigger a duty to diversify. For example some courts have suggested that evidence of a company's impending collapse would be sufficient. *Moench*, 62 F.3d at 572. Other courts have suggested that there may be situations where defendant fiduciaries have knowledge of some impropriety such as misrepresentation, fraud or accounting irregularities and that these situations in combination with the financial condition of the company might trigger a duty to diversify. *See*, *e.g.*, *WorldCom*, 354 F. Supp. 2d at 449-50 (accounting fraud); *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1223-24 (D. Kan. 2004) (misrepresentation). In *Steinman v. Hicks*, the Seventh Circuit noted the following factual scenario might trigger the duty:

> [If the] ESOP was [the employees'] principal retirement asset . . . and was entirely invested in the stock of their employer . . . , and their employer was bought in a stock-for-stock deal—so that all the assets of the ESOP became stock in the acquirer—by a company that had a much higher debt-equity ratio than their (former) employer and as a result its stock price was much more volatile and its bankruptcy risk greater. Then, even if the trustees

> did not predict the company's "impending collapse," they might be required in the interest of the participants either to diversify the plan's stockholdings or to exchange the . . . stock for Treasury bills.

352 F.3d 1101, 1106 (7th Cir. 2003).

Other than *Summers*, *Kuper* is the only one of the cases cited by Petitioners that decided the merits of a district court's judgment for the defendants. *Kuper*, 66 F.3d 1447. *Kuper* affirmed the district court's trial judgment, noting that while plaintiffs presented evidence that the employer stock was declining and defendants were aware of events that would continue to cause the stock to decline in value, defendants presented evidence that the stock fluctuated and several investment advisors recommended holding the stock. *Id.* at 1460. *Kuper*'s holding is consistent with *Summers*.

3. The Seventh Circuit Did Not Create A Per Se Rule

Petitioners argue that the Seventh Circuit announced a new per se rule that evidence that stock "plummet[ed]," "the underlying company" continued to "hemorrhage money," and the company failed to address the problems causing the decline in the stock price were insufficient to overcome the presumption of prudence. Petition at 14. Petitioners do not quote or point to any language in the Seventh Circuit's decision that could support this claim of a new "rule."

The Seventh Circuit did not conclude that the evidence Petitioners presented demonstrated that the stock was "plummeting," would continue to plummet, that the company was "hemorrhaging money," and that UAL was not addressing problems that were causing a decline in its stock price.

In addition, Petitioners' argument that the Seventh Circuit's new per se rule excluded consideration of "the intentions of the

Plan's settlor" is incorrect. Petition at 15. The Seventh Circuit noted that the *Moench* presumption could be overcome by evidence that the increase in the riskiness of the assets, "had it been foreseen, would have induced the *creators of the ESOP [the settlors]* either to have not created it at all or to have required at least partial diversification." *Summers*, 453 F.3d at 410 (emphasis added). Petitioners did not present any evidence of the settlor's intent, nor do they point to such evidence in the record.

B. The Seventh Circuit's Examples Of Excessive Risk Did Not Create A New Rule

To determine what constitutes excessive risk sufficient to require an ESOP fiduciary to override the terms of the plan to fulfill its duty of prudence, the Seventh Circuit contemplated possible approaches a court may utilize depending on the facts and circumstances of each case. For example, in *Steinman*, in dicta, the Seventh Circuit considered how to evaluate the impact of a merger on an ESOP, concluding that it may be appropriate to evaluate the merged company's debt-to-equity ratio and the nature and character of the post-merger stock. *Steinman*, 352 F.3d at 1106. Applying basic economic principles, the court noted that the ESOP now held stock whose price was more volatile and the company's risk of bankruptcy was greater, thereby increasing the risk of the ESOP. *Id.*

Turning to *Summers*, the Seventh Circuit suggested possible criteria to consider in a stock drop case to evaluate the risk of investing in company stock in a market where the stock is declining, including benefits received by employees in the form of income derived from continued employment and other fringe benefits.[36] Because Petitioners did not explore these issues or demonstrate facts sufficient to show excessive risk during the

[36] The evidence in this case showed United provided participants with a diversified 401(k) plan and a defined benefit plan. *See* R.Doc.129, Committee Def. Ex. 5 (Deposition of Craig Musa ("Musa Depo"), 20:09-23:02).

relevant time period, the Seventh Circuit found there was a failure of proof.

Petitioners misstate that the Seventh Circuit created a new fiduciary liability standard requiring the court to the consider the individual assets of each participant and the projected wealth of the employees/participants outside of the ESOP. Petitioners confuse the analysis of the settlor's intent and whether the settlor would have established an undiversified plan in light of conditions reflecting excessive risk to the employees/participants (and which may include an evaluation of the assets of employees outside the plan, including wages, other plans, and fringe benefits) with the analysis of fiduciary liability (which focuses on whether the fiduciaries were acting in the best interests of the plan as a whole and precludes a fiduciary from being partial to any one group of beneficiaries). Under *Kuper*, to determine whether to disregard the terms of the plan, the plaintiff must examine the settlor's intent and show that the ERISA fiduciary could not have reasonably believed that the plan's drafters would have intended under the circumstances that he continue to comply with the ESOPs direction to invest exclusively in employer securities. *Kuper*, 66 F.3d at 1459. This evaluation may include consideration of the wages and benefits of UAL's employees outside of the plan. *See Summers v. State Street Bank & Trust Co.*, 104 F.3d 105, 107-109 (7th Cir. 1997) (the settlors of the UAL ESOP intended to create a retirement plan that would get voting control of the company and majority equity ownership in exchange for accepting lower wages and fringe benefits for a substantial period).

C. The Existence Of Pending Litigation In The Lower Courts Involving "These Issues" Does Not Require This Court To Grant The Petition

Petitioners claim that there is "massive ongoing litigation in the lower courts," involving the "issues" raised in the petition, requiring this Court to accept the petition to provide a "uniform standard" to guide the lower court's decisions. Petition at

21-22. Petitioners cite fourteen district court cases decided in 2006 and a law review article discussing approximately fifty court decisions.

Petitioners do not argue that these decisions create a conflict requiring this Court to grant certiorari, or identify any other reason these cases require review under Rule 10. The majority of the cases Petitioners reference are district court decisions. Petitioners fail to explain why cases pending in the district courts warrant this Court's review of *Summers*. Furthermore, not all of the cases Petitioners reference are currently "pending." *See, e.g., Rankin v. Rots*, No. 02-CV-71045, 2006 U.S. Dist. LEXIS 45706 (E.D. Mich. June 28, 2006) (approval of settlement); *In re IKON Office Solutions Sec. Litig.*, 209 F.R.D. 94 (E.D. Pa. 2002) (same)); *In re WorldCom Inc. ERISA Litig.*, No. 02 Civ. 4816, 2004 U.S. Dist. LEXIS 20671 (S.D.N.Y. Oct. 18, 2004) (same).

Nor do Petitioners identify the "issues" these cases decided that are allegedly raised in the petition. Many of the cases involve issues that are not relevant here. For example, some of the cases involved class certification issues. *See, e.g., In re Aquila ERISA Litig.*, 237 F.R.D. 202 (W.D. Mo. 2006); *In re Elec. Data Sys. Corp. "ERISA" Litig.*, 224 F.R.D. 613 (E.D. Tex. 2004); *In re Qwest Sav. & Inv. Plan ERISA Litig.*, No. 02-RB-464, 2004 U.S. Dist. LEXIS 24693 (D. Colo. Sept. 27, 2004). Other decisions involved approvals of settlement. *See, e.g., Rankin v. Rots*, No. 02-CV-71045, 2006 U.S. Dist. LEXIS 45706 (E.D. Mich. June 28, 2006) (approval of settlement); *In re IKON Office Solutions Sec. Litig.*, 209 F.R.D. 94 (E.D. Pa. 2002) (same); *In re WorldCom Inc. ERISA Litig.*, No. 02 Civ. 4816, 2004 U.S. Dist. LEXIS 20671 (S.D.N.Y. Oct. 18, 2004) (same).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — 29 U.S.C.S. § 1002(21)(A)

§ 1002. Definitions

For purposes of this title:

. . . .

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 USCS § 1105(c)(1)(B)].

. . . .

APPENDIX B — 29 U.S.C.S. § 1102(a)(2)

§ 1102. Establishment of plan

(a) Named fiduciaries.

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

. . . .

APPENDIX C — FEDERAL RULE OF CIVIL PROCEDURE 56(c)

Rule 56. Summary Judgment

. . . .

Motion and Proceedings Thereon. (c) The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

. . . .

APPENDIX D — SEVENTH CIRCUIT RULE 40(e)

Circuit Rule 40. Petitions for Rehearing

. . . .

(e) *Rehearing Sua Sponte Before Decision.* A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

> This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing en banc on the question of (e.g., overruling *Doe v. Roe*.)